

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC

CABELL HUNTINGTON HOSPITAL, INC.,

and

Case 09-CA-263390

SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU), DISTRICT 1199, WV/KY/OH

Eric Brinker, Esq.,
for the General Counsel.
John R. Merinar, Jr., Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried, by agreement of the parties, using Zoom technology on February 2, 2021. Service Employees International Union, District 1199 (the Charging Party/Union) filed the charge in Case 09-CA-263390 on July 22, 2020.¹ The Regional Director for Region 9 (the Region) of the National Labor Relations Board (NLRB/the Board) issued a complaint and notice of hearing on December 3. On December 11, Cabell Huntington Hospital, Inc. (the Respondent) filed a timely answer and affirmative defenses to the complaint denying all material allegations in the complaint. (GC Exh. 1(c).)²

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when (1) beginning about July 17, 2020, the Respondent, by Molly Frick and possibly other supervisors or agents of the Respondent whose identities are

¹ All dates are in 2020, unless otherwise indicated.

² Abbreviations used in this decision are as follows: “Tr.” for transcript; “Jt. Exh.” for joint exhibit; “GC Exh.” for General Counsel’s exhibit; “R. Exh.” for the Respondent’s exhibit; “CP Exh.” For Charging Party’s exhibit; “GC Br.” for the General Counsel’s brief; “R. Br.” for the Respondent’s brief; and “CP Br.” for Charging Party’s brief. Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid in review and are not necessarily exhaustive or exclusive.

currently unknown to the General Counsel, at the Respondent's facility, engaged in surveillance of employees to discover their union button-wearing activities; and (2) beginning about July 17, 2020, the Respondent, by Molly Frick and possibly other supervisors or agents of the Respondent whose identities are currently unknown to the General Counsel, enforced the rule, "[w]e will always show respect and consideration for one another, regardless of status or position", by selectively and disparately prohibiting employees from wearing their "Heroes Over Hypocrites" buttons in support of the Union and by instructing them to remove such buttons.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Huntington, West Virginia, has operated an acute care hospital. During the 12-month period ending December 1, the Respondent derived gross revenues in excess of \$250,000, and purchased and received at the Respondent's facility, goods valued in excess of \$5000 directly from points outside the State of West Virginia. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act. Further, I find, and the Respondent admits, that the Charging Party, at all material times, has been a labor organization within the meaning of Section 2(5) of the Act.

II. STATEMENT OF FACTS

A. Stipulations of Facts

The parties stipulated to the following facts:

1. On July 17, 2020, Director of Human Resources Molly Frick sent the email marked "Employer Exhibit 3" to a group of managers and supervisors employed by Cabell Huntington Hospital.
2. On July 17, 2020, certain nonsupervisory, nonmanagerial employees of Cabell Huntington Hospital wore "Heroes Over Hypocrites" buttons identical to the button depicted in the photograph marked as "Employer Exhibit 2" on their uniforms. Some of the employees wearing these buttons were nurses.
3. On July 17, 2020, certain nonsupervisory, nonmanagerial employees of Cabell Huntington Hospital distributed flyers identical to the flyer marked as "Employer Exhibit 1" on Hospital bulletin boards, union bulletin boards, and in break rooms in the Hospital.
4. On July 21, 2020, certain nonmanagerial, nonsupervisory employees wore on their uniforms "Heroes Over Hypocrites" buttons identical to the button depicted in the photograph marked as "Employer Exhibit 2."

5. On July 21, 2020, Director of Human Resources Molly Frick sent the email marked as “Employer Exhibit 4” to SEIU District 1199 WV/KY/OH Administrative Organizer Amy Hazelett.

6. On July 21, 2020, the emails set forth in “Employer Exhibit 17” were exchanged between SEIU District 1199 WV/KY/OH Administrative Organizer Amy Hazelett, and Director of Human Resources Molly Frick.³

7. On September 4, 2020, SEIU District 1199 WV/KY/OH filed a “Step II” grievance, marked as “Employer Exhibit 9,” about employees being instructed to remove buttons that said, “Heroes over Hypocrites.”

8. At all times relevant to this matter, Cabell Huntington Hospital has had in effect “Standards of Conduct,” marked as “Employer Exhibit 8.” Joint Exhibit 1 EXHIBIT NO.: J 1 RECEIVED: X REJECTED: CASE NO.: 09-CA-263390 CASE NAME: NO. OF PGS: 4 DATE: 02/02/21 REPORTER: JS CABELL X 15 2

9. At all times relevant to this matter, Cabell Huntington Hospital has had in effect policy 30, titled, “Disciplinary Policy,” marked as “Employer Exhibit 19.”

10. At all times relevant to this matter, Michael Mullins, who is named in “Employer Exhibit 1,” and whose image is depicted in “Employer Exhibit 1,” was the president and chief executive officer of Mountain Health Network, the parent of Cabell Huntington Hospital.

B. Union Campaign and Contract Negotiations

As previously noted, Mountain Health Network (MHN) is the parent company of the Respondent which is an acute care hospital. Michael Mullins (Mullins) was the president and chief executive officer (CEO) of the MHN. Since September 2014, Molly Frick (Frick) has been the director of human resources. (Jt. Exh. 1.) Tabitha Fox is director of physician services. The Union currently represents about 2100 of the Respondent’s employees. Since 1972, it has represented approximately 1000 service and maintenance employees whose current collective-bargaining agreement (CBA) with the Respondent expires in November 2021. Likewise, in November 2019 and February 2020, respectively, the Union became the exclusive bargaining representative for about 1000 nurses and a little more than 100 technical employees.

While the Union successfully negotiated successive CBAs for the service and maintenance employees, it had been in contentious negotiations with the Respondent over a first contract for the registered nurses (RNs).⁴ Joyce Gibson (Gibson), vice president secretary/treasurer of SEIU District 1199, was the chief negotiator for the Union in contract negotiations. According to Gibson, the membership was upset about the concessions the

³ The exhibits provided to me by the court reporting service does not include Employer Exhibit 17; and the transcript does not show that Employer Exhibit 17 was identified and admitted into evidence. Nonetheless, I will allow its admission since the parties stipulated to the exhibit.

⁴ A contract between the parties was finally ratified on January 15, 2021.

Respondent wanted them to accept to their wages and benefits. As a result of the difficult contract negotiations, the Union created buttons and flyers to communicate to the public its position that management was putting profits over the needs of its employees. Since at least 1988, the Union had commonly distributed buttons to its members with slogans supporting the Union. From 2016 to 2020, the Union created buttons for its membership to wear with various messages including, among others, “Standing United With All Our Nurses,” “Together We Rise,” “Union Yes,” “Yes I Will,” “Right To Work Is Wrong,” “Union Strong,” and “SEIU 1199.” (GC Exh. 2A-E.) In about July 2020, the Union also created and distributed buttons with the phrase “Heroes Over Hypocrites” and created flyers and operated a mobile billboard with similar messaging. (GC Exhs. 4a, b; R. Exhs. 12–14.) The buttons and flyers were distributed at union meetings, in the hospitals, and at the union hall. (GC Exhs. 2, 3.)

C. Respondent Directs Employees to Remove “Heroes Over Hypocrites” Button

Beginning about July 2020, many nurses began wearing the “Heroes Over Hypocrites” buttons as a show of solidarity during contract negotiations. Sometime in early July 2020, one of the hospital’s directors informed Frick that the “Heroes Over Hypocrites” buttons and flyers were being circulated and worn by some of the staff. The director also sent Frick a screen shot of those flyers from an employee’s Facebook page that had been shared with her. (GC Exh. 3; Jt. Exh. 1, R. 12.) The Director of the Hoops Family Children’s Hospital Naomi Akers first told Frick that the Union bulletin board had a flyer posted with Mullins’ picture and “hypocrite” written across his image which Frick also removed from the board. (Jt. 1; R. Exh. 14.) Maria Summers, director of critical care and emergency services told Frick about the second flyer posted on the union bulletin board in the hospital.⁵ Consequently, in an email to about 170 of the Respondent’s leadership and managers, Frick wrote,

Effectively immediately, please make sure when you are rounding in your units, departments and throughout the Hospital to be aware of any employee who is wearing buttons or badges on their uniforms. If any employee is seen wearing a button that says “Heroes Over Hypocrites” or a similar message, *the employee should be directed to remove the button immediately*, as such buttons are not permitted to be worn by employees while on duty.

(R. Exh. 3.) Frick issued the directive about the buttons and flyers because she felt they violated the Respondent’s written Standards of Conduct (SOC).⁶ According to Frick, the buttons and flyers specifically contravened the SOC sections entitled, “Our Circle of Values” and “Human Resources”. The “Our Circle of Values” section states in part,

Honoring and holding in high esteem those with whom we work and serve.

(R. Exh. 8, p. 4.) The “Human Resources” section states in relevant part,

⁵ It is not clear to me which of the flyers Frick is referencing in this portion of her testimony.

⁶ Frick acknowledges that she was the “driving force” behind the removal of a flyer that she found offensive from the union bulletin board. (Tr. 146 – 147; R. Exh. 14.)

We will always show respect and consideration for one another, regardless of status or position.

(R. Exh. 8, p. 8.) Frick believed the “Heroes Over Hypocrites” buttons and flyers were distinguishable from the other union buttons the Respondent had allowed employees to wear. According to her, the buttons, flyers, and mobile billboard at issue were more egregious than others because they targeted an individual, in this case Mullins, and used “disparaging, disrespectful comments, [and] name calling.” (Tr. 143–144.) In the past, Frick has demanded that the Union remove from its bulletin board at the hospital postings that, in her opinion, were “inappropriate”. For example, the Union had posted a flyer stating that the Director of Pharmacy Sherri Morgan (Morgan) had been “inducted” into the Union’s “Boss Hall of Shame.” (R. Exh. 14.) She had the posting removed. The Union has also posted to its bulletin board at the hospital flyers referencing a specific management official without evidence of the Respondent removing it. An example is a union flyer which targeted Frick for sitting in on a union orientation was posted to the union bulletin board, but Frick claimed to have never seen it in the hospital nor had anyone report to her that it was in the hospital. (GC Exh. 4b.) Likewise, the Union posted another flyer targeting management which stated in part, “Don’t Get Steamrolled by Cabell Executives.” (GC Exh. 4a.) Frick provided undisputed testimony that the flyer preceded her tenure with the Respondent. Regardless, there is no evidence that the Respondent removed it from the hospital. The Respondent also produced evidence of employees being disciplined in the past for directing “disrespectful” comments towards coworkers. In both incidents, the employees were disciplined for making inappropriate and, or vulgar comments directly to coworkers. There is no evidence that the comments were made as part of protected concerted or union activity. (R. Exhs. 18, 20.)

As a result of Frick’s July 17 email, several employees were spotted by managers and, or supervisors wearing the “Heroes Over Hypocrites” buttons. About the first part of July, Holly Bragg (Bragg), an operating room nurse, got a “Heroes Over Hypocrites” button while at a union meeting and wore the button every day to work in various parts of the hospital.⁷ During this period, Bragg, while wearing a “Heroes Over Hypocrites” and other union buttons, went to discuss a matter unrelated to union business with Karen Epling (Epling), her director.⁸ As their meeting was ending, Epling told her she would have to remove the “Heroes Over Hypocrites” button but could leave the other prounion buttons on her uniform. In response to her asking why she had to remove the button, Epling told her that she had received an email from human resources directing her to instruct employees she saw wearing the button to remove it. Consequently, Bragg removed the button.⁹ In addition to briefly wearing the “Heroes Over Hypocrites” button, Bragg also saw flyers in the employee break room with Mullins’ image and the word hypocrite written across it. (Tr. 29; GC Exh. 3.)

⁷ Bragg gave undisputed testimony that since the union campaign started in September or October 2019, she has worn prounion buttons throughout the hospital, even in the presence of the Respondent’s CEO, chief of nursing, patients, and families. (Tr. 24–27.)

⁸ Assistant Director Heidi Hamady was also present but there is no evidence that she spoke during the meeting.

⁹ Bragg provided undisputed testimony that she wore the “Heroes Over Hypocrites” button for only a “matter of days” before being told by Epling to remove it. (Tr. 25–26.)

Shawn Merritt (Merritt), housekeeper and union member, gave undisputed testimony that he has worn buttons supporting the Union and nurses throughout his 5-year tenure with the Respondent. He has either worn or observed employees wearing union buttons with the slogans, “Standing United With Our Nurses,” “Together We Rise,” “Union Yes,” and “Union Strong.” In
 5 presumably July 2020, Ruth Davis (Davis) a union delegate in housekeeping, gave him a “Heroes Over Hypocrites” button which he wore with the intent that other people would see it. Approximately 30 minutes after Davis gave him the button, he was waiting next to the elevator when his supervisor, John Gibson¹⁰ (John Gibson) approached him and told him to remove it because John Gibson had received an email that employees were not allowed to wear the button.
 10 Merritt was with two other housekeepers, one of the housekeepers also had on the button, when John Gibson approached him. Merritt removed the button and told Davis and another union delegate, Leah Workman (Workman), about the incident. During his tenure with the Respondent, this was the only occasion when he had ever been asked by management to remove a pronoun button.

15 Another bargaining unit employee in housekeeping, April Dent (Dent), received a “Heroes Over Hypocrites” button in the summer of 2020 from Amy Hazlett (Hazlett), a union representative, who was distributing them in the hospital cafeteria. Dent has worn and seen other employees wear union buttons at work. (GC Exhs. 2a-d.) She attached the “Heroes Over
 20 Hypocrites” button to the outside of her jacket slightly below her shoulder where people could see it. Following her shift, John Gibson approached her while she was in the storeroom putting away her items and told her to remove the “Heroes Over Hypocrites” button she had received that day. After she was told to remove the button, Dent went outside where she told Workman, Davis, and Merritt about her encounter with John Gibson. Merritt responded that John Gibson had also
 25 instructed her to remove her “Heroes Over Hypocrites” button. Dent also read “about the button” on the Union’s social media page. (Tr. 113.)

Several of the Respondent’s managers and supervisors acknowledged receiving Frick’s email and instructing employees to remove their “Heroes Over Hypocrites” buttons. Emily
 30 Stacy (Stacy), nurse manager maternal services, oversees about 155 employees in her department. Whenever, Stacy encountered an employee with the button she would ask them to remove it. She recalls observing four nurses in her department wearing the “Heroes Over Hypocrites” button attached to their jackets or name badges and told them to take it off. The nurses all interacted with patients and the patients’ families. Stacy specifically recalls telling an
 35 employee, “[u]nfortunately I have to ask you to take that [Heroes Over Hypocrites] button off. The other buttons that you have on are fine, but that one I’ll have to ask that you remove.” (Tr. 127.)

40 John Gibson, lead supervisor in the housekeeping department, corroborated Dent’s and Merritt’s versions of their interactions with him over the “Heroes Over Hypocrites” button. He acknowledges that he received the email from Frick instructing managers and supervisors to tell employees that he observed with the “Heroes Over Hypocrites” buttons on to remove them. On two separate occasions, John Gibson saw an employee wearing the button. During the first

To avoid confusing witnesses John Gibson and Joyce Gibson (no relation), I will refer to John Gibson by his first and last name throughout this decision. I will refer to Joyce Gibson by her last name.

encounter, the button was clearly visible on the employee's "scrub top" so he asked the employee to remove the button; and the employee complied. The second encounter occurred within the "past couple of months" when he saw an employee with the button and asked, "what are you wearing that for?" (Tr. 175-176.) Another employee that was with the employee wearing the button responded that they were "allowed to wear those now" because "the Labor Board" authorized it. (Tr. 176-177.) Since John Gibson had not received any other communications "in a while" about the button and he was unsure if the directive against wearing it had been rescinded, he did not tell the employee to remove the button or take any other action.

D. Gibson's Discovery of Employees Being Directed to Remove the Button

On July 21, Gibson discovered that employees were being asked to remove the "Heroes Over Hypocrites" buttons when Bragg told her that her supervisor had demanded that she take it off. Dent also told Gibson that she had been directed by a supervisor to remove her "Heroes Over Hypocrites" button. In addition to Bragg and Dent, Gibson also received from an employee the email that Frick sent to the Respondent's managers and supervisors telling them to look for employees wearing the "Heroes Over Hypocrites" button and ask them to remove it. (Tr. 47-49; GC Exh. 3.) The employee who forwarded the email to Gibson had received it anonymously from one of the Respondent's managers. Moreover, Gibson personally viewed posts on SEIU District 1199 social media page about management asking employees to remove the "Heroes Over Hypocrites" buttons.

Gibson was troubled by Frick's email because, except for the "Heroes Over Hypocrites" button, she was unaware of employees ever being asked to remove union buttons. There had been a longstanding practice at the hospital that prounion buttons were permissible for employees to wear at work. Gibson was aware of about 300 employees wearing the "Heroes Over Hypocrites" button. The goal was to disseminate the message of "corporate greed" and corporate hypocrisy as wide as possible. Additionally, the union always created flyers around contract negotiations and these negotiations were no different than prior efforts. (GC Exhs. 4a and b.) The Union gave the "Heroes Over Hypocrites" flyers and buttons to members to share with other people; and the Union placed them throughout the hospital for other people to see, in addition to the mobile billboard with the same messaging. Images of the "Heroes Over Hypocrites" button and the flyer labeling Mullins a hypocrite were also posted on the private group Facebook pages for the nurses, service technicians, and maintenance technicians. There is no evidence that anyone took postings on those private sites and reposted them to a public website. Gibson acknowledges that in the past the Union has been asked by the Respondent to remove flyers from the Union bulletin board that the Respondent found offensive; and the Union would comply. (See R. Exh. 14.) In this instance, Frick told the Union that the flyer with the word "hypocrite" written across an image of Mullins was offensive and asked the union to take it down and the Union removed it. Instead, the Union distributed the flyer directly to union members. As a result of the Respondent telling managers to be aware of employees wearing the "Heroes Over Hypocrites" button, asking them to remove the buttons, and demanding the Union take the flyer off the union bulletin board, Frick filed the complaint at issue.

III. DISCUSSION AND ANALYSIS

A. Respondent's Surveillance of Employees

5 The General Counsel argues that the language in Frick's email to the managers and supervisors to "be aware" of specific buttons "employees were wearing and then have the objectional ones removed, Respondent effectively surveilled its entire workforce looking for button wearing activity." (GC Br. 11.) The Respondent counters that the record lacks evidence that managers sought out employees wearing the "Heroes Over Hypocrites" button but rather the
10 buttons were "obvious, and . . . managers happened to notice the buttons in the course of their normal routines." (R. Br. 5.)

 The Board and federal case law have long held that surveillance of employees by an employer, even if the employees are unaware of it, violates the Act. *NLRB v. Grower-Shipper Vegetable Assn.*, 122 F.2d 368 (9th Cir. 1941); *Ivy Steel & Wire, Inc.*, 346 NLRB 404 (2006); *Flexsteel Industries*, 311 NLRB 257 (1993). Nonetheless, an employer may observe employees engaging in Section 7 activities in an open and public manner on or near its property. This observation is legal if done in a manner that is not out of the ordinary and absent coercive behavior. *Smithfield Foods, Inc.*, 347 NLRB 1225 (2006) (employer did not engage in illegal
20 surveillance when, because of a reasonable concern about employee trespassing on employer property, it moved a security camera to an area where employee handbilling and trespassing had taken place); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007) (the Board found unlawful surveillance where supervisor admitted to working outside her normal schedule because she believed union activity may be occurring); *Eddylean Chocolate Co.*, 301 NLRB 887,
25 888 (1991) (noting "[t]he Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not do something out of the ordinary"). Whether the employer's surveillance of its employees is unlawful is determined by, the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation."
30 *Aladdin Gaming, LLC*, 345 NLRB 585, 585-586 (2005), petition for review denied 515 F.3d 942 (9th Cir. 2008). The Board has held, however, that random or isolated observations of Section 7 activities, such as handbilling, do not violate the Act. *Id.*

 Applying the standards set out in Board law, I find that the General Counsel has met her
35 burden of proof. The evidence established Frick sent an email to a broad swath of approximately 170 of the Respondent's managers and supervisors telling them to specifically ". . . be aware of any employee who is wearing buttons or badges on their uniforms. If any employee is seen wearing a button that says, "Heroes Over Hypocrites" or a similar message, the employee should be directed to remove the button immediately. . . ." It was not established exactly how long
40 management purposely made note of the type of pronoun buttons employees were wearing but the testimony established that it lasted at least a week. It was not merely done for a few minutes or hours. The Respondent argues that it was not engaged in surveillance because the General Counsel's witnesses and the Union admit that the buttons were worn openly throughout the hospital with the intent that as many people as possible would see it. Further, the Respondent
45 claims that "[t]here is no evidence of a manager seeking out an employee for the purpose of determining whether he or she was wearing a button." I find this argument unpersuasive and

patently false because Frick, in her email to managers and supervisors, *specifically tells them to be aware of employees wearing the “Heroes Over Hypocrites” buttons.* (Emphasis added.) The message to management to surveil employees for the offending button cannot be any clearer. Moreover, the past practice of allowing employees to wear prounion buttons is additional proof that it was unusual for management to monitor the types of buttons employees wore to work.

Accordingly, I find that beginning about July 17, 2020, the Respondent illegally surveilled its employees in violation of Section 8(a)(1) of the Act.

B. Employees Told to Remove Prounion Buttons

The General Counsel argues that the employees have a “statutory right to wear union insignia at work; and the Respondent failed to sustain its burden of establishing that special circumstances existed which justified it prohibiting employees from wearing the “Heroes Over Hypocrites” button.¹¹ The Respondent counters that there is no evidence that it selectively or disparately enforced its SOC when barring employees from wearing the “Heroes Over Hypocrites” button; and under the test set forth in *General Motors, LLC*,¹² it had a legitimate basis for taking action against employees who wore those buttons.

In *Republic Aviation*,¹³ the Supreme Court held that the right of employees to wear union buttons at work, absent “special circumstances”, is a protected activity. This right has been extended to other union clothing and items. *Chinese Daily News*, 353 NLRB 613 (2008) (employer violated the Act by creating a dress code policy prohibiting employees from wearing clothing with the name or logo other than the employer, specifically including the union); *Sam’s Club*, , 349 NLRB 1007 (2007) (while the Board held banning badge backer bearing a statement of their rights under the Act was unlawful, it found the employer could prohibit the wearing of lanyards with the union logo only because the employer was able to establish the nonbreakaway nature of the lanyards created a safety issue); *P.S.K. Supermarkets, Inc.*, 349 NLRB 34 (2007) (the Board held the exposure of customers to union buttons, standing alone, is not a special circumstance, nor is the fact that the rule prohibited all buttons, not just union buttons). The right of employees to wear items with union insignias must be balanced against an employer’s right to manage its business in an orderly fashion. However, a rule restricting or prohibiting the wearing of items with union logos must be narrowly tailored to justify the rule. *Wal-Mart Stores v. NLRB*, 400 F.3d 1093 (8th Cir. 2005), enfg. as modified 340 NLRB 637 (2003) (employer violated the Act because there was no evidence that shirts with union logos interfered with the operation of the store); *Goodyear Tire & Rubber Co.*, 357 NLRB 337 (2011) (employer ban on employees wearing T-shirts that said “scab” in relation to contract employees was not justified by special circumstances).

The Respondent argues that justification exists for banning the wearing of “Heroes Over Hypocrites” button (and removing the flyers) because the button singles out a specific individual

¹¹ The General Counsel also argues, in anticipation of the Respondent using it as a defense, that the Respondent’s status as a hospital does not overcome its unlawful conduct. (GC Br. 9–10.) Since, however, the Respondent did not raise this argument, I will not address it.

¹² 369 NLRB No. 127 (2020).

¹³ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

for scorn, derision, and disrespect. According to Frick, other union buttons and flyers were allowed because they were “simply statements of union principles” and not directed at a particular individual or individuals. I find that this justification fails for several reasons.

Unlike the flyers, the “Heroes Over Hypocrites” button does not display an image of Mullins or any actual person. Rather it displays the image of a generic cartoonish-like male. The Respondent contends that, regardless, people likely assume that the character on the button is Mullins because his picture also appears on the flyer and mobile billboard with the word “hypocrite.” Notwithstanding, there is no evidence, either testimonial or documentation, to substantiate this argument. The Respondent could have introduced witnesses to testify that they believed the image on the button was Mullins but failed to do so. Second, the Respondent points to its discipline of other employees for using vulgar comments towards coworkers as proof that it did not enforce its SOC in a disparate manner. The evidence is not persuasive because it is distinguishable from the circumstances in this matter. The examples the Respondent used show employees using vulgar and other inappropriate language without any evidence that it was in pursuit of concerted protected or union activity. The employees in this case wore the “Heroes Over Hypocrites” button as a sign of union solidarity and to protest the Respondent’s proposals in negotiations over a CBA. Wearing the prounion buttons is a classic example of employees exercising their Section 7 right to engage in union activity. Moreover, the Respondent failed to present any evidence to show how wearing the button presented a real risk of upending a “culture of civility and respect” in the hospital. (Tr. 143.) The Respondent also presented zero evidence that labeling Mullins and the other executives at the hospital as hypocrites had a negative impact on its ability to serve its patients or harmed any other aspect of its business.

Last, I find that the Respondent is misguided in its reliance on *General Motors, LLC*. More recently, the court in *National Labor Relations Board v. Maine Coast Regional Health Facilities*, 999 F.3d 1, 11 (2021) noted that the “new” *Wright Line* test established in *General Motors, LLC* does not apply to single motive cases, which is at issue here. Moreover, the court noted that in *General Motors, LLC*, “the Board cabined its holding to cases involving abusive conduct, specifically exempting mere disparagement or disloyalty.” *Id.* This is identical to the type of conduct that the Respondent is accusing the Union, and by extension employees wearing the buttons, of committing. Therefore, under the “old” *Wright Line* test or the “new” *General Motors, LLC* test, the Union’s actions do not lose protection of the Act and the Respondent acted illegally in requiring employees to remove the “Heroes Over Hypocrites” button.

Accordingly, I find that beginning about July 17, 2020, the Respondent’s used its rule to selectively and disparately prohibit employees from wearing their “Heroes Over Hypocrites” button in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Cabell Huntington Hospital, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated the Act by the following conduct:

- a. Since about July 17, 2020, engaged in surveillance of employees to discover their union button-wearing activities.
- b. Since about July 17, 2020, used its rule to selectively and disparately prohibit employees from wearing their “Heroes Over Hypocrites” buttons.

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3. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

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4. The Respondent has not violated the Act except as set forth above.

REMEDY

15 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

20 The Respondent, having discriminatorily surveilled its employees and stopped them from wearing their “Heroes Over Hypocrites” buttons while working, must allow its employees to wear the buttons and, or similar buttons; and cease surveilling its employees for their union activities.

25 Further, the Respondent will be required to post and communicate by electronic post to employees the attached Appendix and notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

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ORDER

The Respondent, Cabell Huntington, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Surveilling its employees for their union activities.

40 (b) Enforcing a facially neutral policy in a discriminatory manner that requires employees to refrain from wearing buttons in support of union activity.

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

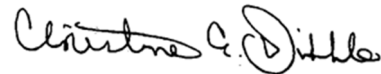
2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, notify employees that they are allowed to wear their "Heroes Over Hypocrites" buttons to work; and the Respondent will not surveil or appear to surveil employees for their union activities.

(b) Within 14 days after service by the Region, post at its facility in Huntington, West Virginia, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. September 30, 2021



Christine E. Dibble (CED)
Administrative Law Judge

¹⁵ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT surveil or appear to surveil you in the exercise of your union activities.

YOU HAVE THE RIGHT to wear buttons in support of the union while at work, including buttons with the slogan "Heroes Over "Hypocrites" and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

CABELL HUNTINGTON HOSPITAL, INC.
(Employer)

DATED: _____ **BY** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

**National Labor Relations Board
John Weld Peck Federal Building
550 Main Street, Room 3-111
Cincinnati, Ohio 45202-3271
Telephone: 513-684-3686
Fax: 513-684-3946
Hours: 8:00 a.m. to 4:30 p.m., ET**

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/09-CA-263390> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S (513) 684-3733.